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No. 80-15
(Consolidated with No. 80-11)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AMOCO PRODUCTION COMPANY and
MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, and CECIL ANDRUS, Secretary of the Interior,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

Of Counsel:

R. H. LANDT
Amoco Production Company
Amoco Building
17th & Broadway
Denver, CO 80202

RICHARD L. MARLAR
Marathon Oil Company
Findlay, OH 45840

JOHN R. COONEY
Counsel of Record

MARK B. THOMPSON III
P. O. Box 2168
Albuquerque, NM 87103
Telephone (505) 243-4511

JOHN H. PICKERING
SAMUEL A. STERN
1666 K Street, N.W.
Washington, D.C. 20006
Telephone (202) 872-6000

Counsel for Petitioners

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SUPPLEMENTAL BRIEF FOR PETITIONERS *

The order of July 2, 1981, restoring these cases "to the calendar for reargument" did not request supplemental briefs or direct counsel to focus on any of the various issues presented. Nevertheless, both respondents have filed supplemental briefs. Accordingly, although we stand on our prior briefs, petitioners submit this supplemental brief to clear up misconceptions advanced by respondents.

The supplemental brief for the Secretary of the Interior [1] begins with a bare-boned suggestion that this Court's recent decisions in *Montana v. United States*, No. 79-1128 (Mar. 24, 1981), and *Commonwealth Edison Co. v. Montana*, No. 80-581 (July 2, 1981), are dis-

* See Appendix for current Rule 28.1 listing.

[1] This brief is submitted by the Acting Solicitor General and states that the Solicitor General is disqualified.

positive of "at least some" of the issues (p. 2). However, that suggestion is manifestly incorrect, and it is not pressed. As the order for reargument indicates, nothing dispositive has occurred since these cases were briefed and argued; moreover, as we shall discuss, those recent decisions generally support petitioners.

The bulk of the Secretary's supplemental brief, like that of the Tribe, is devoted to reformulating arguments that have not prevailed so far and to attacking arguments that we petitioners have not made.[2] The Secretary's arguments begin with the statement that "we are far from suggesting that the points we now discuss are substantial." (Supp. Br. at 2). Petitioners agree for the following reasons:

I. The Tribe Does Not Have "Sovereign" Power to Tax Nonmembers Except as a Condition to Entry.

Respondents' supplemental briefs studiously ignore the central issue at the heart of this case—whether the 287 separate tribal governments existing within the borders of the United States may exercise an unprecedented sovereign taxing power, unrestrained by the normal political processes and ungoverned by constitutional guarantees, over the economic fortunes of American citizens who are not and can never be tribal members. The expansive view of tribal sovereignty urged by the Secretary and the Tribe is bad law and bad policy. After a century of efforts by the federal government both to forge an economic common market and to encourage participation by American Indians in our national life, it cannot serve the long-term interests of the nation or its citizenry at this late date to create a vast array of politically unaccount-

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[2] The Tribe's supplemental brief also raises irrelevant issues about whether the Department of the Interior has fulfilled its trust duties to the Tribe. These allegations have nothing to do with whether the Tribe has "sovereign" power to impose severance taxes on petitioners. It would be novel, indeed, if sovereignty could be created by breach of trust or fraud.

able and economically autonomous satrapies throughout the country.

Respondents' core proposition is that Indian tribes have inherent sovereign power to tax the exploitation of mineral resources within their territory under leases granted to nonmembers.[3] That proposition has no support in the existing case law. As we have already shown: (1) Indian tribes have no inherent sovereign power to tax the activities of nonmembers, except when their tax is based upon the power to exclude and imposed as a condition of entering or remaining on their reservations; and (2) every prior decision upholding taxation of nonmembers rests on that ground.[4] In each prior case cited by respondents—ranging from the first grazing fees[5] to the more recent cigarette taxes[6]—the parties had fixed in advance, in mutually understood terms, the full cost of entry on the reservation, or of participation in the taxed activity.

These points are emphasized in this Court's most recent discussion of the extent of tribal power over nonmembers. Generally speaking, there is no such power. Thus, as this Court said in *Montana v. United States*, *supra*, the principles relied on in prior cases "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." There are two possible exceptions. A "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers

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[3] The asserted power to tax rests solely on claimed inherent sovereign power. Respondents concede that no treaty or statute authorizes the Jicarilla severance tax.

[4] *See* our initial brief at 8-10 and our reply brief at 1-6.

[5] *See Morris v. Hitchcock*, 194 U.S. 384 (1904).

[6] *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Also, a tribe may have some civil authority over the conduct of nonmembers on its reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Slip op. at 19-20. Neither of those exceptions is applicable here.

The consensual relationship required for tribal taxation is wholly lacking. Petitioners are on the Jicarilla Reservation under preexisting leases which are not only silent about taxation but also provide that rents and royalties may not be increased without petitioners' consent. Also lacking is any conduct that "threatens" the Tribe. Petitioners' activities on the Reservation pursuant to their leases granted by the Tribe cannot be regarded as interfering with the Tribe's self-government rights or as threatening its political integrity, economic security, or health and welfare.[7]

The requirement of a "consensual relationship" is crucial, because it provides the only protection available to nonmembers who have no recourse to Indian political processes to restrain tribal power. When the terms and conditions of entry are specified in advance, nonmembers can choose on a rational basis whether to enter a reservation or not, just as they can choose whether to subject themselves to taxes by other actions, such as purchasing cigarettes, as in *Colville*. Without that choice, nonmembers are at the mercy of tribal power. That is particularly true in this case. When petitioners entered into their leases they had no notice that the Tribe would

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[7] In these circumstances, the Secretary's reliance on *Montana v. United States* is baffling indeed. For that decision is yet another example of this Court's rejection of expansive claims of tribal sovereignty—this time by prohibiting Indians from regulating non-Indian hunting and fishing on fee-patented lands within the Reservation. Slip op. at 18-20. *See also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

later seek to impose severance taxes, and they have made substantial investments to develop their leases. To subject them now to inherent Indian "sovereignty" to tax is wholly inconsistent with our scheme of government and the principles of individual liberty guaranteed by the Constitution.[8]

Almost a century ago this Court noted the unfairness of subjecting Indians to the criminal laws of their non-Indian neighbors. *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883). *See also In re Mayfield*, 141 U.S. 107, 115-16 (1891). *Cf. Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903). More recently, it was deemed equally unjust that tribal courts assert criminal jurisdiction over nonmembers, even for offenses committed against Indians on the reservation. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978).[9] Petitioners submit that it is likewise unfair and mischievous to subject unsuspecting non-Indians to newly-created, "sovereign" powers of taxation and regulation by tribes.[10]

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[8] *See* our initial brief at 11-15. The inconsistency between our constitutional scheme and an inherent Indian power to tax non-Indians is elaborated upon in the *amicus* brief of the Salt River Project Agricultural Improvement and Power District, at 4-7.

[9] Just as a decision upholding the criminal jurisdiction of tribal courts over non-Indians could have subjected non-Indian defendants to the various criminal laws of more than one hundred tribal jurisdictions, *see Oliphant, supra*, at 196, an affirmance in this case might create upwards of two hundred new taxing jurisdictions, each a tiny Liechtenstein within our borders.

[10] Recognition of the "sovereignty" claimed by respondents will open the floodgates to increased taxation and other forms of tribal regulation. *See* our initial brief at 26 n.34, and our reply brief at 6 n.17. Indeed, the Tribe not only asserts that it has the sovereign power to tax and to regulate, but that it needs the tax in order to develop and enforce programs to "protect" its resources. *See* Tr. Supp. Br. 18. While it is difficult to conceive of over two hundred tribes levying their own taxes upon mineral development,

It is undisputed that Congress has not conferred taxing power upon the Tribe; indeed, as we have already shown, all taxing power was given to the states, to the exclusion of the tribes, by the 1927 Act.[11] But respondents contend that tribes require this extraordinary, unrestrained taxing power to protect their patrimony; *e.g.*, respondents' supplemental briefs are replete with suggestions that the Tribe owns the "mineral resources" within its Reservation.[12] This contention cannot be sustained. The Jicarilla have already been compensated for the minerals underlying their aboriginal lands, which are not included in their executive order reservation.[13] Thus, the Tribe's sole interest in the oil and gas is that conferred by Congress in 1927 as an act of legislative grace. It consists exclusively of rents, royalties and bonuses, and nothing more; and, even if the Tribe had proprietary ownership, that would not justify the severance tax. *See* our initial brief at 14-15 and our reply brief at 5-6 and n.15.

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it is even more disturbing to contemplate so many unaccountable nation-states utilizing taxation and other forms of regulation (production allowables, spacing requirements, etc.) as a "sovereign tool" to "restrict depletion" of mineral resources underlying Indian reservations.

[11] *See* our initial brief at 15-23 and our reply brief at 6-10; and *see also infra*, pp. 9-15.

[12] See, *e.g.*, the Secretary's Supp. Br. at 5, 8-9, 12, 17-18. The Tribe also asserts (Tr. Supp. Br. 10) that the tax is necessary because the Tribe must protect "their lands, resources, and people."

[13] The Jicarilla were awarded $9,150,000 by the Indian Claims Commission in 1971 for the 1883 value of their aboriginal lands located east of the Rio Grande River. 25 Ind. Cl. Comm. 248 (1971). The amount awarded specifically included "compensation for the loss of lands, minerals, and timber." 25 Ind. Cl. Comm. 227, at 229, 230, 233 (1971). *See* our reply brief at 5-6 and n.15.

In denying the existence of any general tribal power to tax nonmembers, we draw no distinction between reservations created by executive order and those created by treaty or statute. Contrary to the Secretary's assertion (Supp. Br. at 4-5), we do not contend that any inherent Indian rights of self-government or taxing power differ according to the nature of a tribe's reservation.[14] But we do contend that the Jicarilla do not "own" oil and gas under their Reservation and that their tax cannot be justified as payment for exploitation of tribal resources or as compensation for their eventual depletion. The leases give the Tribe the bonuses, rents and royalties that Congress granted in 1927, and the Tribe is not entitled to anything more. Particularly, the Tribe is not entitled unilaterally to increase the specified rents and royalties under the guise of imposing a "tax" upon the lessees. By whatever name it is known—license, permit, or severance tax—the Jicarilla exaction is no more than a veiled attempt to increase the Tribe's proceeds in violation of specific guarantees in the leases.[15]

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[14] We have never made that contention, and it is our position that regardless of the nature of a reservation (treaty, statutory, or executive order) Indians have no power to impose severance taxes on lessees like petitioners who are on a reservation pursuant to valid leases. *See* our reply brief at 5-6 and n.15 and at 7-8 and n.21.

We do not agree, however, that Indian tribes have uniform "sovereign" powers. Such powers can, and do, differ because of history or special treaty or statutory provisions. As noted below, no treaty or statutes empower the Jicarilla Tribe to tax (J.A. 145) and as Chief Judge Seth discussed in dissent the Tribe had not historically asserted sovereignty over nonmembers (J.A. 168-75).

[15] The Tribe cannot justify its tax by alleging that the Department of the Interior has breached its trust duties to the Jicarilla (Tr. Supp. Br. at 2-6). These irrelevant allegations of breach of trust add nothing to the resolution of the issues before this Court. The Tribe's desire for additional revenues (*id.*; and *see also Jica-*

The sweeping sovereignty, unrestrained by constitutional limitations such as the Commerce Clause, that respondents advocate will profoundly dislocate, not just the leasing process, but the whole web of relationships between our Indian and our non-Indian citizenry. In our interdependent twentieth century society, it is inadmissible that non-Indians should be taxed by tribal governments in which they can never be represented and which are not subject to the political checks or constitutional restraints that protect persons against all other governmental entities. Such an anachronistic preferment for Indian "sovereignty" cannot be tolerated in the taxing sphere any more than it can be permitted in the area of criminal jurisdiction. *Cf. Oliphant, supra.* Here, as there, it does not suffice to say that petitioners can be protected from unrestrained Indian authority by Congress in the exercise of its plenary power over Indian affairs or by the Secretary's approval of the Jicarilla tax ordinance. Congress has already spoken on the matter by the 1927 Act and the Secretary's approval is neither required nor effective.[16] And once the power to

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rilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536 (D.N.M. 1979)), cannot supply what is lacking—the authority, as a sovereign, to tax or regulate nonmembers.

[16] Requiring Secretarial approval is inconsistent with the inherent sovereignty claimed here by the Secretary and the Tribe. No statute or regulation requires Secretarial approval of ordinances such as the Jicarilla severance tax. The Indian Reorganization Act simply provides that tribal constitutions and bylaws are to be "approved by the Secretary" (25 U.S.C. § 476). No standards are specified for approval, and there is no requirement that the Secretary balance or even consider the rights of non-Indians who may be adversely affected by asserted tribal power. The Tribe's constitution does provide that taxes on nonmembers are "subject to approval by the Secretary." Again, no standards are specified, and there is nothing in this record suggesting that the approval given by the

tax or regulate is recognized, it is virtually impossible to put limits on it.[17]

II. The Recent Origin of Tribal Severance Taxes Reinforces the Preclusive Effect of the 1927 Act and Evidences the Lack of Any Such Taxing Power.

A. *The 1927 Act preempted any severance taxing power that may have existed.*

As urged in our previous briefs, whatever vestigial severance tax powers tribes may have enjoyed prior to the 1927 Act did not survive that legislation (initial brief at 16-23; reply brief at 6-11). Congress' failure in 1927 specifically to address an unexercised and undiscovered Indian taxing power over non-Indians does not alter the fact that recognition of such a power would thwart the Act's fundamental purpose. For it is clear that Congress intended to and did effect a clean division between the taxing power on the one hand and the bonuses, rents, and royalties on the other; in the end, it gave *all* of the former to the states and all of the

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Secretary's delegate to the Tribal constitution and severance tax ordinance was anything more than *pro forma*.

Also, there is serious question whether Secretarial approval can effectively be challenged by the injured public. The Tribe has claimed that it is an indispensable party to any such challenge and that it is immune from suit. *See* Motion to Dismiss of Jicarilla Apache Tribe, *Conoco v. Andrus*, No. 80-261 C (D.N.M., filed Aug. 26, 1981).

[17] This impossibility is recognized in decisions of this Court as far back as *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 439-40 (1827), and as recently as last term's decision in *Commonwealth Edison Co. v. Montana*, *supra*. If the power to tax non-Indian lessees is upheld, other forms of regulation—restricting development of needed energy resources—are sure to follow. *See* n.10 *supra*.

latter to the tribes. This legislative compromise was the product of deliberate design, not accident, and its implementation is utterly inconsistent with the exercise of tribal taxing powers. Respondents nevertheless persist in ignoring the purpose and effect of this compromise, and make new arguments that are also wrong.

The history and effect of the compromise are detailed in our prior briefs and will not be repeated here. We simply note that the Secretary now incorrectly asserts that "allowing State taxation of the *lessee's* interest was never a contested issue. Every proposal included that feature, and no one suggested that this pre-empted tribal taxation." (Supp. Br. at 12). That assertion is simply wrong. Taxation of the lessee's interest was disputed, and several versions of the proposed Act, including the one first passed by the Senate, failed to authorize any state severance taxation at all.[18] If Congress had intended to authorize or permit dual taxation by separate sovereigns, it would not have given the states the full power to tax the entire, unapportioned, production (including the Indians' royalty share),[19] because such a scheme both frustrates the Act's grant of taxing power

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[18] *See* S. 876, 68th Cong., 1st Sess. (1924); 66 Cong. Rec. 999 (1924). *See also* H.R. 9133, 69th Cong., 1st Sess. (1926); S. 3159, 69th Cong., 1st Sess. (1926); S. 1722, 69th Cong., 1st Sess. (1925).

[19] The provision authorizing state taxation was first inserted by the House Committee on Indian Affairs immediately after H.R. 9133 was amended to allocate to the tribes the entire royalty portion, including the 37½% of the royalty interest that had originally been earmarked for the states. The *quid pro quo* embodied in the Committee's amendments is obvious: the states gave up their royalty portion, in return for which they received the taxing power over *all* production, including the Indians' royalty share. *See* H.R. Rep. No. 763, 69th Cong., 1st Sess. 1, 3 (1926).

At the prior argument counsel was asked whether the 1927 Act was necessary to give the states the power to tax (*see* Tr. 17,

to the states and invites a multiple burden on commerce. It simply "defies common sense to suppose" that Congress intended that the tribes could also tax just like the states when the necessary result is to impair the states' ability to tax.[20]

The Secretary's attempts to liken this case to *Commonwealth Edison* (Supp. Br. at 11) are baseless. Unlike the petitioners in that case, we do not concede the validity of *any* portion of the challenged tax (*cf.* slip op. at 9). For it is not the *rate* of the tribal tax which thwarts the congressional scheme, but its very existence.[21] The Secretary contends that when Congress enacted leasing legislation authorizing state taxation in 1920, and again in 1927, it failed to appreciate the magnitude of the severance taxes states ultimately would impose. Even if this were true,[22] the imposition of huge taxes by the states

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21). The grant may have been needed to support state taxation of the Indians' royalty share, even after the demise of the instrumentality doctrine (*see Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 347 n.14, 353 (1949)), but the lessee's interest should be taxable by the state without congressional authorization (*id.*). The broad authorization to tax given by the 1927 Act rebuts any contention that the state tax interferes with Indian self-government, or is preempted by comprehensive federal regulation. *Cf. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

[20] *Cf.* the "common sense" construction given the Crow allotment acts in *Montana v. United States*, *supra* (slip op. at pp. 13-14 n.9) to deny tribal power over nonmembers.

[21] Our argument that any Indian severance taxing power has been preempted rests upon the explicit grant of the taxing power to the states made in the 1927 Act and the extensive federal regulation of Indian leases, not upon generalized notions of national policy such as were found unpersuasive in *Commonwealth Edison*, *supra*. *See* our initial brief at 16-27.

[22] The legislative history of the 1927 Act indicates that Congress was aware that the states might impose a "very high production tax" and that "[t]he power to tax is the power to destroy." Hearings before a Subcomm. of the Comm. on Indian Affairs, H. Rep., on H.R. 9133, 69th Cong., 1st Sess. at 26 (1926); H.R. Rep. No. 1637, 68th Cong., 2d Sess. at 3 (1925).

does not imperil the statutory framework like the addition of another tax, imposed fifty years after passage of the Act, by a wholly separate entity. For when Congress authorized state taxation of mineral production on federal lands, it did so without limitation and in the knowledge that states would be free to determine the appropriate rates. *See Commonwealth Edison Co., supra* (slip op. at 20). What Congress did not foresee and could not have intended when it authorized the leasing of executive order Indian reservations is that Indian tribes, purporting to wield sovereign powers, would attempt to wrest control of some or all of the taxing power explicitly granted by Congress to the states. That wholly unauthorized usurpation of delegated power distorts the legislative scheme and undercuts the taxing authority explicitly conferred upon the states.[23]

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[23] The Secretary argues that Congress did not abrogate the Indian taxing authority in 1927 because it was "not conscious of the prerogative in question." (Supp. Br. at 10-11). This argument not only unduly denigrates Congress (*see* note 29, p. 17, *infra*); it also demonstrates that the Secretary misunderstands the economics of oil and gas production, although Congress did not. In the 1927 Act itself, as well as in a series of statutes preceding and following it, Congress created oil and gas estates whose measure was based upon the "paying quantities" test. *See, e.g.*, 25 U.S.C. §§ 396a, 396g, 398, 398a (1976); 30 U.S.C. §§ 187a, 226-1 (1976); and 43 U.S.C. § 1337(b) (Supp. III 1979). *See also* 15 U.S.C. § 3312(c)(1)(C)(i) (Supp. III 1979) ("commercial quantities"). "Paying quantities" means, of course, that the amount received from sale of the production must exceed the costs of production. *See* H. Williams & C. Meyers, Oil and Gas Law, Manual of Terms 457-58 (1980); *Cf. Andrus v. Shell Oil Co.*, 446 U.S. 657, 663-64 (1980). As the trial court found (J.A. 130), any Indian severance tax absorbed by the producers would increase the cost of production, force the abandonment of some wells, and decrease the level of production against which the state tax is measured. The result is to hamstring the tax Congress specifically authorized.

This is not speculative theory. Unlimited state and Indian severance taxes cannot exist side by side. This is explained in the *amicus* brief of New Mexico, North Dakota, Utah and Wyoming. It is also shown by the recent decision of the Ninth Circuit in *Crow Tribe of Indians v. Montana*, 650 F.2d 1104 (9th Cir., July 13, 1981), involv-

Although the 1927 Act accorded executive order tribes the benefit of bonuses, rents, and royalties, it conferred no other rights upon them. Certainly it did not "confirm" ownership of executive order lands in the tribes. That hypothesis, raised for the first time in the Secretary's supplemental brief (at 2-3), surely would have startled the Act's authors, who stated:

> Nothing in this bill is intended to in any manner change or alter the ownership or legal and equitable title to the lands described by its terms. The question of what rights the Indians may have in and to Executive order reservations will not be affected by its passage and the courts can squarely decide that issue without reference to this legislation.

H.R. Rep. No. 763, 69th Cong., 1st Sess. 8 (1926). *See also Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183, 1191-92 (D. Ariz. 1978), *aff'd in part, rev'd in part on other grounds*, 619 F.2d 801 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980).[24] The contention is not only at

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ing Montana's 30 percent coal severance tax and the similar 25 percent tax of the Crow Indians. We believe that the Ninth Circuit's decision—holding that the Crow Tribe stated a claim and was entitled to a trial on its contention that the state's tax could not be applied to production from its lands—was wrong, especially since it failed to consider the effect of this Court's prior decision of July 2, 1981, on the Montana tax in *Commonwealth Edison, supra.* Nevertheless, the case illustrates the problem of unlimited taxes by the states and the Indians. A petition for rehearing of the Ninth Circuit's decision is currently pending.

The impracticality of side by side state and Indian taxes is also shown by *Colville, supra,* where the parties agreed that, if the state could tax, the tribe's sales to non-Indians would "dry up." 447 U.S. at 145.

[24] The district court in *Sekaquaptewa* found that the 1927 Act did not recognize or confirm any Indian title and specifically rejected, 448 F. Supp. at 1192, the views of the law review writer whose article is cited and relied upon by the Secretary (Supp. Br. at 2-3). The Court of Appeals concurred without discussion.

odds with the position of the Tribe itself,[25] but it has repeatedly been rejected by this Court in decisions rendered two decades after the passage of the 1927 Act.[26]

There is nothing inequitable or niggardly in Congress' decision in 1927 to grant Indians the bonuses, royalties, and rents while withholding the taxing power. As already stated, the proponents of the Act were well aware that executive order tribes had no legal entitlement to any oil and gas underlying their reservations. Furthermore, the benefits ultimately bestowed are by no means insubstantial; indeed, the Jicarilla Tribe's yearly royalty portion is more than sufficient to support the entire cost of tribal government. *See* our reply brief at 5 n.14. Because the royalties are calculated as a percentage of the market value of production (never less than 12½%), the Tribe will continue to enjoy a commensurate measure of the benefits as the cost of energy rises.[27] Moreover, the Tribe will be free to in-

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[25] The Tribe argues, in equally unorthodox fashion, that the 1927 Act was repealed by implication in 1938 (Tr. Br. at 33-35), a position we have already refuted (*see* our initial brief at 23 n.29 and reply brief at 10) and which the Secretary does not urge.

[26] *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103-04 (1949); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 175-77 (1947); *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942).

[27] Contrary to the Tribe's contention (Tr. Supp. Br. at 12-13), we do not claim that the Jicarilla should assume "substantial portions of the cost" of mining on the Reservation; nor do we believe that the Tribe should be denied the benefits of its royalties. We do state, however, that petitioners' activities do not threaten the "economic security" of the Tribe; the Jicarilla are not "entitled" to tax, and they do not "need" (Tr. Supp. Br. at 11) any additional revenues from the lessees, beyond the bonuses, rents, and royalties, to support any portion of their tribal government. Moreover, by the Tribe's own account (Tr. Supp. Br. at 6), the sole impetus and rationale for the tax was the federal government's alleged failure adequately to "protect and conserv[e] reservation lands and re-

crease the percentage of royalties in any future leases to the extent that the marketplace allows.

The legislative scheme of the 1927 Act, which gives bonuses, rents, and royalties to executive order tribes, is not an aberration; rather, it reflects Congress' consistent judgment about the elements of a fair, adequate, and reasonable resolution. Although not dispositive of congressional intent in 1927, it is instructive to note that a later (and presumably more enlightened) Congress resolved aboriginal claims to vast portions of Alaska by according the Natives an interest in the mineral wealth without providing for the exercise of any political rights (Act of December 18, 1971, 85 Stat. 688). That solution, which conveyed land without creating "sovereignty," was deemed adequate compensation to the Alaska tribes and sufficient protection of their inherent interests. Surely the Jicarilla, who assert no aboriginal claim to the Reservation they occupy, cannot be said to require greater compensation or more protection than their Alaskan counterparts.

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sources." If this be true, the solution surely cannot be to tax the producers for the government's faults.

The Tribe also contends (Tr. Supp. Br. at 9) that a decision for petitioners would leave the Jicarilla powerless to "control [the lessees'] activities in any manner whatsoever, except for violation of a specific lease provision." Those fears are unfounded. Operations of oil and gas lessees on Indian reservations are subject to numerous federal regulations that govern exploration and production operations and prescribe a myriad of conservation and environmental protection measures. *See* our initial brief at 25-26. If the Secretary should fail to enforce the lease terms and regulations, the Jicarilla have shown themselves willing and able to sue to compel such enforcement. *See Jicarilla Apache Tribe v. Supron Energy Corp.*, 479 F. Supp. 536 (D.N.M. 1979).

B. *The failure to assert tribal severance taxing power until now evidences the lack of any such power.*

Any doubt about Congress' intentions in 1927 and the "shared presumption" of all parties concerning the lack of tribal severance taxing power is resolved by the Tribe's failure during the next five decades to tax lessees producing minerals on the Reservation. That failure is not explained by the tragic history of relations between Indians and the federal government, recited at length by the Secretary, Supp. Br. at 6-10; nor by the forced comparison between "red" men and black men. *Id.* at 7.[28]

Contrary to the Secretary's suggestion (Supp. Br. at 5-10), we do not contend that Indian sovereign power, constitutional rights, or civil liberties can be lost by non-use or non-assertion. We do urge that non-use evidences the lack of Indian power to impose severance taxes on non-Indian lessees and that such lack is shown by a long train of circumstances—the failure to impose such taxes until recently, the unbroken pattern of statutes giving states power to tax production from Indian leases with-

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[28] The Secretary's strained analogy of Indian sovereignty to the rights of "blacks, women, or aliens" (Supp. Br. at 6) is manifestly inapt. The assertion of heretofore unknown tribal powers over non-Indians hardly resembles the efforts of emancipated minorities to vindicate civil rights explicitly defined by law, guaranteed in the Constitution, and long enjoyed by white male citizens. Not only is the status of tribes unique within the constitutional framework, but the power asserted by the Jicarilla is a governmental one never previously exercised, over either members or nonmembers, at any time in the history of the Tribe or this nation.

The suggestion (Supp. Br. at 9) that the Allotment Acts were intended as retribution upon the Civilized Tribes of Oklahoma for their attempts to tax nonmembers "exploiting Reservation resources" is utterly fanciful. But it is no less farfetched than the notion that the Jicarilla were dissuaded from taxing mineral production by the "punishment" visited upon their brethren in Oklahoma.

out any mention of Indian taxing power and by Congresses familiar with Indian permit and licensing taxes,[29] the longstanding and unchallenged imposition of state severance taxes on Indian reservation production, and the recent recognition by Congress' policy review commission that the 1924 Act (authorizing state taxation of production from treaty and statutory reservations) and the 1927 Act (authorizing state taxation of production from executive order reservations) should be repealed to permit Indian taxation.[30] Moreover, the long continued failure of any tribes to exercise the claimed power, or to challenge the taxes imposed by the states under authority of the 1927 Act, dispels any notion that taxation is necessary to tribal self-government. *See Montana v. United States, supra*, slip op. at 18 n.13, 20; *Oliphant v. Suquamish Indian Tribe, supra.*

III. The Jicarilla Severance Tax Offends the Commerce Clause by Discriminating, Taxing Commerce Itself, and Imposing an Impermissible Multiple Burden.

Contrary to the Secretary's suggestion (Supp. Br. at 2 and n.1), this Court's recent decision in *Common-*

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[29] The Secretary unduly denigrates Congress when he suggests (Supp. Br. at 11) that it was "not conscious of the prerogative in question." We can assume that Congress is aware of the law—*e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)—and it had precedents for authorizing both direct Indian taxes (*see* pp. 10-11 and n.3 of the Secretary's original brief) and taxes for the benefit of the Indians (*see* 25 U.S.C. §§ 319, 321, authorizing the Secretary to impose taxes for the benefit of the Indians on rights-of-way). Against this background Congress has consistently given the states the power to levy severance taxes on Indian lands, without any mention or recognition of any parallel Indian taxing power (examples of those statutes, in addition to the 1927 Act, are given in note 25, p. 21 of our initial brief).

[30] *See* 1 American Indian Policy Review Commission, Final Report 174, 181, 347 (1977). This point is elaborated upon in our initial brief at 22 n.28, and in our reply brief at 7-10. Although the preclusive effect of the 1924 Act is not presented in this case, we submit, as the Commission concluded, that it is preclusive also.

wealth Edison Co. v. Montana, No. 80-581 (July 2, 1981), does not foreclose any of our arguments under the Commerce Clause. We have argued that the Jicarilla "tax" violates the Commerce Clause in three respects.[31] None of them was involved in *Commonwealth Edison*:

First, the tax discriminates against production sold or transported off the Reservation in favor of production remaining on the Reservation. No such blatant geographical discrimination was present in *Commonwealth Edison*. Although the producers in that case claimed that Montana's tax unfairly burdened residents of other states, the tax was computed at the same rate regardless of the coal's destination. Thus, the Court was not confronted "with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other 'discrimination' cases." Slip op. at 6-7. By contrast, the Jicarilla tax is specifically tailored to fall only on production "sold or transported off the Reservation." [32] That is a patently forbidden differential

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[31] *See* our initial brief at 30-43, and reply brief at 12-20.

[32] The Secretary's contrary construction of the plain language of the tribal taxing ordinance, Supp. Br. at 19-21, is tortured and violates the first canon of statutory interpretation because it renders the ordinance grammatically unsound. If the Tribe had intended to adopt a non-discriminatory ordinance that effectively taxed all production, as is claimed, it could have copied the language of any of the model state statutes then in place. *See* our reply brief at 16.

Respondents also misstate our discrimination argument. The vice in the Jicarilla ordinance is not that it exempts royalty taken in kind, but that it allows the Tribe to market *all* oil and gas under a two-tiered pricing system, with one price for customers beyond the Reservation borders, and another for those on the Reservation. The danger that the Tribe will use its discriminatory tax to reap commercial advantage is neither "contrived" nor "imagined" as the Secretary suggests (Supp. Br. at 20-21). Indeed, the Tribe has already been held to be "a competitor in the sale of natural gas." *See Jicarilla Apache Tribe v. Supron Energy Corp.*, 479 F. Supp.

if, as we contend, the Tribe is subject to the restraints of the Commerce Clause.[33]

Second, under the plain language of the ordinance, the tax is also imposed upon an activity integral to the flow of interstate commerce, in violation of *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). There was no claimed violation of the *Michigan-Wisconsin Pipe Line Co.* rule in *Commonwealth Edison*.

Third, in conjunction with the New Mexico severance taxes, the Jicarilla tax creates an impermissible multiple burden upon the flow of commerce. This Court has never countenanced such unapportioned, double taxation by concentric taxing authorities. *Commonwealth Edison* did not reach that issue, for, as this Court was at pains to point out, the challenged tax in that case was imposed by a single sovereign; thus, no claim was made of unfair apportionment or potential multiple burden. Slip op. at 6. Nor did *Colville* reach the multiple burden point presented here.[34]

536, 541 (D.N.M. 1979). While the Tribe may use its royalty oil and gas as it chooses, it cannot favor on-Reservation industry by taxing only production that leaves the Reservation. The fact that no such on-Reservation industry presently exists does not save the discriminatory tax, because it must be judged by its potential, as well as its actual, effect upon commerce. *See* our reply brief at 16-17 and n.38.

[33] The Secretary persists in contending that the Tribe is not subject to the Commerce Clause (Supp. Br. at 18). That position makes neither constitutional nor common sense for the reasons stated in our reply brief at 12-16.

[34] *Colville* upheld both state and tribal taxes on the same cigarette sales to nonmembers. However, no challenge to the tribal tax was raised or considered under the Commerce Clause. The state tax was upheld against a challenge under the Indian Commerce Clause because it did "not burden commerce that would exist on the reservations without respect to the tax exemption." 447 U.S. at 157. As previously noted, the agreed effect of the state tax was to "dry up" tribal cigarette sales to nonmembers.

In short, *Commonwealth Edison* leaves unscathed and undecided all of our Commerce Clause arguments. Indeed, the case has strengthened our position by rejecting the notion, advanced by the Tribe,[35] that severance taxes affect only intrastate commerce, and thus are immune from scrutiny under the Commerce Clause. Slip op. at 3-6. Moreover, the fact that states may now tax at full value, regardless of whether the burden imposed on an individual taxpayer is commensurate with the benefits received, makes it all the more imperative that multiple taxation be prohibited. Commerce will suffer if two independent, concentric authorities are each permitted to levy the entire costs of their separate governments against a single taxpayer operating within their jurisdictions. But that is the consequence of the position taken by the Secretary and the Tribe—the states and the tribes may each tax without limit. Such unlimited dual taxation cannot coexist as a practical matter. (*See* note 23, pp. 12-13, *supra*). Nor can it be squared with the Commerce Clause, or with the action of Congress in giving taxing power to the states by the 1927 Act. In view of that Act, it is unnecessary for this Court, as the final arbiter of the restraints of the Commerce Clause, to choose between the states and the tribes, or to attempt to devise some apportionment formula for avoiding the multiple burden arising from the Jicarilla tax. Congress made that choice in 1927 when it conferred upon the states the full, exclusive power to tax the severance of oil and gas on executive order Indian reservations.

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[35] *See* the Tribe's brief at 53-54.

CONCLUSION

For the reasons stated above, and in our initial and reply briefs, the decision below should be reversed.

Respectfully submitted,

Of Counsel:

R. H. LANDT
Amoco Production Company
Amoco Building
17th & Broadway
Denver, CO 80202

RICHARD L. MARLAR
Marathon Oil Company
Findlay, OH 45840

JOHN R. COONEY
Counsel of Record

MARK B. THOMPSON III
P. O. Box 2168
Albuquerque, NM 87103
Telephone (505) 243-4511

JOHN H. PICKERING
SAMUEL A. STERN
1666 K Street, N.W.
Washington, D.C. 20006
Telephone (202) 872-6000

Counsel for Petitioners

APPENDIX

APPENDIX

CURRENT LISTING PURSUANT TO RULE 28.1

A. *Petitioner Amoco Production Company*

The following is a current listing of parents, subsidiaries and affiliates of Amoco pursuant to Rule 28.1.

Standard Oil Company (Indiana)
Amoco Canada Petroleum Company, Ltd.
Amoco Credit Corporation
Amoco Oil Holdings S.A.
Amoco Pipeline Company
Analog Devices Inc.
Cetus Corporation
Chicago Bank of Commerce
Cyprus Mines Corporation
Amoco (U.K.) Exploration Company
Solarex Corporation

B. *Petitioner Marathon Oil Company*

The following is a current listing of parents, subsidiaries and affiliates of Marathon pursuant to Rule 28.1.

The Airport Company of Hilton Head Island, Inc.
Alaska Transportation Service Company
American Minerals Company
Arbeitsgemeinschaft Steinkohle
Arctic LNG Transportation Company
Atlantic Nickel Mines Limited
Automotive Fuel Corporation
Automotive Fuel Corporation of Delaware, Inc.
Badger Pipe Line Company
Bonded Oil Company
Bonded Stations, Inc.
Bonded Supply Co.
Bosart Co.

Canadian Australian Petroleum No Liability
Carriage Creek Inc.
Cavalier Petroleum Company of Cuba
Cheker-Imperial Oil Co. of Alabama
Cheker-Imperial Oil Co. of Arkansas
Cheker-Imperial Oil Co. of Georgia
Cheker-Imperial Oil Co. of Iowa
Cheker-Imperial Oil Co. of Kansas
Cheker-Imperial Oil Co. of Mississippi
Cheker-Imperial Oil Co. of Missouri
Cheker-Imperial Oil Co. of Nebraska
Cheker-Imperial Oil Co. of Tennessee
Cheker Oil Company
Cheker Oil Company of Delaware, Inc.
Cheker Oil Company of Florida, Inc.
Cheker Oil Company of Indiana, Inc.
Cheker Oil Company of Michigan, Inc.
Cheker Oil Company of Ohio, Inc.
Cheker Oil Company of Wisconsin, Inc.
City Point Oil Terminal, Incorporated
CLAM Petroleum Company
Coastal Plains Oil Company
Compania Iberica Refinadora de Petroleos, S.A.
Compania Minera Marathon, Ltd.
Consolidated Stations Incorporated
Cook Inlet Pipe Line Company
Deutsche Marathon Explorations GmbH
Deutsche Marathon Petroleum GmbH
Deutsche Transalpine Olleitung GmbH
Domex Packaging Ltd.
Dor Rae Realty, Ltd.
Dynamic Petroleum Products, Inc.
East Texas Salt Water Disposal Company
ECOL Inc. (A Delaware Corporation)
ECOL Inc. (A Mississippi Corporation)
Ecuadorian Offshore Corporation
Elk Water Users Association

Emro Land Company
Emro Leasing Company
Emro Marketing Company
Emro Propane Company
Explorer Pipeline Company
Express Oil Company
Farmers Union Central Exchange, Incorporated
Federal's Inc.
Findlay Aviation Services, Inc.
Frontier Resources, Inc.
Frontier Spar Corporation
Fuelgas Company, Inc.
Gardner-Matthews Plantation, Inc.
Gastown, Inc. of Delaware
Globe Oil Company, U.S.A.
Gravcap, Inc.
Green Bay Terminal Corporation
Hancock Shipping Company, Limited
The Hilton Head Company, Inc.
The Hilton Head Golf Club, Inc.
The Hilton Head Hotel Company, Inc.
Hilton Head Island Realty, Inc.
Hilton Head Management Co., Inc.
The Hilton Head Racquet Club, Inc.
Holden Fuel Oil Corporation
Indonesian Enterprises, Inc.
International Petrodata, Inc.
Interocean Oil Colombia, Inc.
Interocean Oil Company, Inc.
Interocean Oil Development Company (Nigeria)
Interocean Oil Exploration Company (Nigeria)
Kenai LNG Corporation
Key Pipe Line Co. Ltd.
Kroll Glass Service, Inc.
Lafayette Parking, Inc.
Litchfield Land Company, Inc.
LOCAP INC.

LOOP INC.
Magnorth Petroleum Ltd.
Mannheim Terminal and Warehousing Service Company
Marathon Chemical Company
Marathon Development Norway, Ltd.
Marathon Energy, Ltd.
Marathon Espanola de Petroleos, S.A.
Marathon Exploration Tunisia, Ltd.
Marathon Finance Company
Marathon Finance Corporation
Marathon International Finance Company
Marathon International Oil Company
Marathon International Petroleum (G.B.) Limited
Marathon International Petroleum Supply Company
Marathon International S.A.
Marathon Marine, Inc.
Marathon Mining Ireland, Ltd.
Marathon Oil Company (A Delaware Corporation)
Marathon Oil Company (An Ohio Corporation)
Marathon Oil North Sea (G.B.) Limited
Marathon Oil Overseas Finance N.V.
Marathon Oil U.K., Ltd.
Marathon Petroleum Amazonas, Ltd.
Marathon Petroleum Angola, Ltd.
Marathon Petroleum Argentina, Ltd.
Marathon Petroleum Australia, Ltd.
Marathon Petroleum Bolivia, Ltd.
Marathon Petroleum Brasul, Ltd.
Marathon Petroleum Brazil, Ltd.
Marathon Petroleum Burma, Ltd.
Marathon Petroleum Canada, Ltd.
Marathon Petroleum Colombia, Ltd.
Marathon Petroleum Company
Marathon Petroleum Company (Ireland) Limited
Marathon Petroleum Company (Norway)
Marathon Petroleum Ecuadorian, Ltd.

Marathon Petroleum Egypt, Ltd.
Marathon Petroleum Exploration, Ltd.
Marathon Petroleum (G.B.) Limited
Marathon Petroleum Germany, Ltd.
Marathon Petroleum Ghadames, Ltd.
Marathon Petroleum Guatemala, Ltd.
Marathon Petroleum Honduras, Ltd.
Marathon Petroleum Indonesia, Ltd.
Marathon Petroleum Ireland, Ltd.
Marathon Petroleum Irian Jaya, Ltd.
Marathon Petroleum Italy, Ltd.
Marathon Petroleum Kenya, Ltd.
Marathon Petroleum Libya, Ltd.
Marathon Petroleum Natuna, Ltd.
Marathon Petroleum Netherlands, Ltd.
Marathon Petroleum Netherlands Antilles, Ltd.
Marathon Petroleum (Netherlands Antilles) N.V.
Marathon Petroleum Norge A/S
Marathon Petroleum Norte Brazil, Ltd.
Marathon Petroleum North Sea (G.B.) Limited
Marathon Petroleum Pakistan, Ltd.
Marathon Petroleum Paraguay, Ltd.
Marathon Petroleum Peru, Ltd.
Marathon Petroleum Philippines, Ltd.
Marathon Petroleum Santos, Ltd.
Marathon Petroleum Senegal, Ltd.
Marathon Petroleum Siri, Ltd.
Marathon Petroleum Spain, Ltd.
Marathon Petroleum Sri Lanka, Ltd.
Marathon Petroleum Syria, Ltd.
Marathon Petroleum Thailand, Ltd.
Marathon Petroleum Tunisia, Ltd.
Marathon Petroleum Turkey, Ltd.
Marathon Petroleum U.K., Ltd.
Marathon Petroleum Venezuela, Ltd.
Marathon Petroleum Viet-Nam, Ltd.
Marathon Pipe Line Company (A Delaware Corporation)

Marathon Pipe Line Company (A Nevada Corporation)
Marathon Property Finance, Inc.
Marathon Refining Company
Marathon Resources, Inc.
Marathon Service Company
Marathon Service (G.B.) Limited
Marathon Servicos de Exploracao e Desenvolvimento Ltda.
Marco South, Inc.
Michigan Tankers, Inc.
Mid-Wood, Inc.
Muesing, Inc.
Mustang Petroleum Company
Oasis Oil Company of Libya, Inc.
Ohio Oil Company
Oil Insurance Limited
Oil Shippers Service, Inc.
Oklahoma Oil Co.
Overlook Restaurant, Inc.
Pan Ocean De La Republica Dominicana Ltd.
Pan Ocean Energy Company
Pan Ocean Exploration, Inc.
Pan Ocean Niger, Ltd.
Pan Ocean Oil (Canada) Ltd.
Pan Ocean Oil Corporation (Abu Dhabi)
Pan Ocean Oil Corporation (Ecuador)
Pan Ocean Oil Corporation (Indonesia)
Pan Ocean Oil Corporation (Maldive Islands)
Pan Ocean Oil Corporation (Nigeria)
Pan Ocean Oil Corporation (Thailand)
Pan Ocean Oil Ltd.
Pan Ocean Petroleum Netherlands, Ltd.
Panwest Pty. Limited
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 2 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.

Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Pembalta Gas System No. 7 Ltd.
Pembalta Gas System No. 8 Ltd.
Petemco, Inc.
Petroleum Terminals, Inc.
Petroleum Terminals, Incorporated
Pilot Oil Corporation
The Plantations of Hilton Head, Inc.
Platos Properties, Inc.
Platte Pipe Line Company
Polar LNG Corporation
Polar LNG Shipping Corporation
POOC Caribbean Oil Finance N.V.
POOC International Oil Finance N.V.
POOC Overseas Exploration and Development B.V.
Port Oil Inc.
The Port Royal Country Club, Inc.
The Port Royal Inn and Country Club, Inc.
The Port Royal Inn and Golf Club, Inc.
Port Royal Plantation, Inc.
Product Terminals, Inc.
P.V. Commodity Systems Ltd.
Qualbank, Inc.
Redwater Water Disposal Company Limited
Russell Stewart Oil Co.
Sage Creek Coal Limited
Sandcastle Land Company, Inc.
Saratoga Minerals, Ltd.
Shipyard Golf Club, Inc.
Shipyard Plantation, Inc.
Shipyard Racquet Club, Inc.
Sidon Canal Co.
Societa Italiana Per L'Oleodotto Transalpino, S.p.A.
Southern Ventures Pty.
Speedway Oil Company of Canada, Limited
Speedway Petroleum Corporation

Texas-Alberta Oil Corporation
Tideland Realty of Hilton Head, Inc.
Transalpine Finance Holdings S.A.
Transalpine Olleitung in Osterreich G.m.b.H.
U-Save, Inc.
Valley Beach, Inc.
Webster Service Stations, Inc.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyoming Industrial Development Corporation